

in the estate of the deceased. But it was decided in *Gardner v. Simmes*, 1 Gill, 425, that it applied only to property, *choses in action*, or money belonging specifically to the deceased while alive, and remaining in the executor's hands as executor, and to property, *choses in action*, &c., received by the executor in that capacity and so retained until his death; and, therefore, where an executor is, or, as in that case, was from lapse of time (though the Court there declined to fix the *minimum* time after which the presumption would arise), presumed to be in possession of property as legatee,<sup>6</sup> the Orphans Court has no power to order it to be delivered over; and as only the delivery of the property or the payment of money specifically can be ordered, the Court has no right to decree its estimated or nominal value; nor can it decree payment of interest,<sup>7</sup> to recover which a preliminary proceeding must be taken under the Code, Art. 93, sec. 11,<sup>8</sup> to compel the executor of the executor to render further accounts (it being by that section his duty to render an account of the receipts and disbursements of the latter), or an averment must be inserted in the petition, that the executor has mixed the money with his own or made use of it for his own profit, *Donaldson v. Raborg*, 26 Md. 312; but under the last mentioned section, the executor of the executor has a right to show that an apparent balance of the estate has been distributed by his testator \*amongst the parties entitled to receive it, *Raborg* **587** *v. Donaldson*, 28 Md. 34. The balance of an account appearing to be remaining in the hands of an executor at the time of his death, without explanation that it has been wasted or lost, or unless retained by order of the Orphans Court, is to be treated as money in his hands, *Lemmon v. Hall*, 20 Md. 168; *Donaldson v. Raborg*, 26 Md. 312.<sup>9</sup> In general, therefore, the securities to which the Act applies are those which were originally assets or into which assets may be specifically traced, and the money to which the Act applies is money having, so to speak, an ear-mark, by which it may be identified as assets or the representative of assets.<sup>10</sup> In *De Valengin v. Duffy*, 14 Peters, 282, the Court said, that whatever property or money is lawfully recovered or received by an executor or administrator, after the death of the testator, in virtue of his representative character, he holds as assets, and he is liable in his representative character to the party who has a good title thereto, though the latter has his election to

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<sup>6</sup> The presumption arises after the time for stating an account has passed. *Baker v. Bowie*, 74 Md. 476; *Van Bibber v. Reese*, 71 Md. 619.

<sup>7</sup> As to an executor's or administrator's liability for interest, see *Dalrymple v. Gamble*, 68 Md. 167; *Garrison v. Hill*, 81 Md. 206.

<sup>8</sup> See *Baker v. Bowie*, 74 Md. 473, 477.

<sup>9</sup> Distinguish *Biays v. Roberts*, 68 Md. 510.

<sup>10</sup> The statement in the text is affirmed in all respects in *Stewart v. Ins. Co.*, 53 Md. 571; *Baker v. Bowie*, 74 Md. 467; *Morrow v. Fidelity Co.*, 100 Md. 256.

As to the remedies of a new executor or administrator against a removed executor or administrator, see Code 1911, Art. 93, sec. 248; *State v. Smith*, 64 Md. 101. Cf. *State v. Brown*, 64 Md. 97; *State v. Robinson*, 57 Md. 486; *Campbell v. State*, 62 Md. 1.